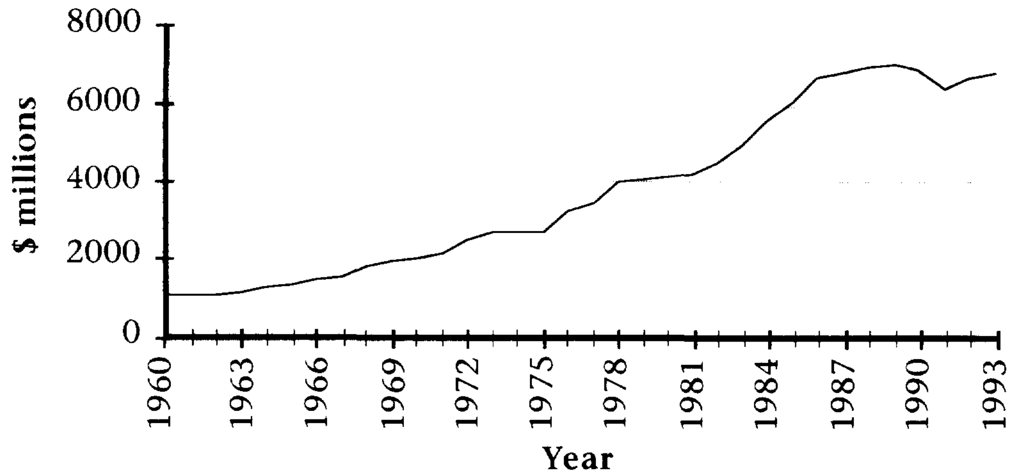
Figure 6 Real local television advertising expenditures, 1960–93[82]



LECG notes that PTAR did not reach its final form until 1975, implying that this delayed any impact of PTAR on local advertising. While there were modifications and clarifications of the Rule after 1970, none of them altered the effective ban on network programming from all markets during the access period starting in the fall of 1971. By replacing a half hour of network programming with station-originated programming, the Rule eliminated national network advertising and created an opportunity for increased local advertising beginning in the fall of 1971. Modifying the Rule as to the types of programs that could be shown during the access period prospectively in 1975 did not have any effect on the fact that a half hour of network programming and the associated national network advertising time were eliminated starting in 1971.

By only discussing what happened to local spot television advertising starting in 1975, LECG creates the impression that there was something unique about its growth in 1976. In fact, expenditures on all types of advertising increased markedly in 1976, as shown in Figure 3. While local spot television advertising grew by $376 million from 1975 to 1976, national spot television advertising increased by $531 million and net-

82 Source: Appendix A, Table A-5.

work television advertising increased by $551 million.[83] Total newspaper advertising increased by $1,468 million in 1975–76 and total radio advertising increased by $350 million. For each of these categories of advertising, real expenditures grew faster (or the growth was second-fastest) in 1975–76 than in any other one-year period between 1960 and 1993. Overall, total national advertising increased by $3,205 million, the largest one-year percentage increase in real terms in the 1960–93 period, and total local advertising increased by $2,315 million, the second largest percentage increase in real terms during the same period, only slightly lower than the 1983 increase. Hence, all advertising media—national and local, not just local spot television advertising—experienced record growth in 1976. LECG ignores the economy-wide increase in advertising expenditures in 1976 when attributing growth in local television advertising to PTAR. It is unlikely, to say the least, that PTAR affected all advertising media. Similarly, the growth in local television advertising expenditures during the 1980s occurred when the economy, and expenditures on other advertising media, were also growing.

Even accepting LECG's argument that the Rule favors local advertising over national advertising, economic theory provides no basis for favoring one type of advertising over the other. Removal of the Rule may increase the amount of national advertising and reduce the amount of local advertising, though even that is not certain. Currently, affiliates carry both national spot and local advertising during the access period. It is possible that given the freedom to program as they wish in the access period, ABC, CBS and NBC affiliates would simply replace national spot advertising with national network advertising, leaving the amount of local advertising unchanged.

With regard to local programming, LECG notes that expenditures on news by independent stations in the ten largest markets grew dramati-

83 All advertising data are from McCann-Erickson. All advertising expenditures are in nominal dollars. Real growth rates were computed after deflating by the GDP implicit price deflator, ECONOMIC REPORT OF THE PRESIDENT (1995) 278.

cally in the 1980s, though nationally the growth was much slower.[84] LECG does not provide any evidence, however, that PTAR was responsible for the increase in local news expenditures. Moreover, the percentage of independent stations broadcasting prime time or late news fell from 21.5 percent in 1975 to 15.3 percent in 1993.[85] Most of the stations that INTV lists as carrying news, either prime time/late news or morning news, are Fox affiliates, and the growth of news on independent stations increased markedly after the emergence of the Fox network. The growth of the Fox network, combined with Fox not providing programming during the last hour of prime time, is likely to have contributed more to the growth of local news programming on independent stations than PTAR did.

From an economic standpoint, independent stations would not subsidize local news and public affairs programming using any increased profits resulting from the access period distortion. Broadcast stations have no reason to increase their broadcasts of news and public affairs because of increases in the profitability of entertainment programming. In fact, such an increase is more likely to lead stations to *reduce* the amount of news and public affairs broadcasting. There is no market failure to prevent the independent decisions of program suppliers and broadcasters from determining the efficient amount of each type of programming.

Interestingly, LECG does not show that PTAR increased the amount of local programming on ABC, CBS and NBC affiliates, one of the Rule's stated purposes. While the originators of the Rule may have envisioned high-quality, locally-produced news and public affairs shows, the reality is that 70 percent of the access period programming on ABC, CBS and NBC affiliates in the top-50 markets is comprised of first-run nationally syndicated programming.[86] LECG presents no evidence that there is more local pro-

84 LECG, *supra* note 1, at 58.

85 *See* INTV, *supra* note 35, Exhibit 8 for the number of independent stations providing news broadcasts. *See* EI, *supra* note 23, at 67, Table A–3 for total number of independent stations.

86 *See* EI, *supra* note 23, at 47, 61, and Appendix H. *See* INTV, *supra* note 35, Exhibit 2.

gramming during the access period on ABC, CBS and NBC affiliates now than there was prior to the Rule. Thus there is no basis for the claim that eliminating the Rule will affect the amount of local programming offered by ABC, CBS and NBC affiliates during the access period.

VII. Impact of the Rule on Program Diversity

One of the initial motivations for the Rule was to foster "source" diversity—that is, a variety of program producers and owners.[87] It also was intended to "increase diversity of programs available to the public."[88] Williamson and Woroch focus most of their comments on the issue of diversity. LECG does not address diversity in any detail. Williamson and Woroch claim that diversity benefits flow from the Rule, but they fail to provide any evidence that the Rule actually resulted in an increase in programming diversity or any other kind of diversity. In addition, they present no arguments that diversity would diminish if the Rule were removed. Perhaps most importantly, Williamson and Woroch fail to explain how the economic cost of promoting increased diversity is more than offset by the economic or other benefits of diversity.

To a large extent, Williamson and Woroch's arguments concern vertical relationships among program producers, networks and stations. They claim that the network restriction aspect of PTAR promotes program diversity "by supporting non-hierarchical contracting alternatives for program production, by allowing networks and their affiliates to achieve potential collective action benefits, and by counteracting tendencies toward market foreclosure."[89] The Rule is needed, they claim, because programming diversity is threatened by greater vertical control in televi-

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87 FCC, Further Notice of Proposed Rule Making, MM No. 91-221 & 87-8, Released Jan. 17, 1995, ¶61.

88 FCC, Notice of Proposed Rule Making, *supra* note 69, ¶1.

89 Williamson & Woroch, *supra* note 2, at iii.

sion production and distribution.[90] They present no evidence, however, and make no compelling arguments in support of any of these issues.

Williamson and Woroch appear to recognize the efficiency gains that stem from vertical relationships between networks and stations. "Large fixed costs of program development—combined with formidable economies of simultaneous, nationwide delivery...make network distribution an extremely cost-effective means of video delivery. In addition, networks can economize on the transaction costs by spreading the cost of programming, and affiliate and advertiser relations, over large amounts of programming."[91] Williamson and Woroch claim that keeping network programming out of the access period yields diversity benefits that outweigh the losses from reduced network efficiencies. They have not shown, however, that the Rule actually increases diversity (and there is evidence that it does not), nor have they explained how they weigh the benefits and costs.

A. Hierarchical relationships in broadcasting

Williamson and Woroch argue that PTAR is essential for non-hierarchical contracting in broadcasting, and that hierarchical contracting (in which "one party complies with the 'orders' of another"[92]) undermines program diversity. In fact, the current non-hierarchical nature of relationships in broadcasting has nothing to do with PTAR. Rather, it is the result of competition.

According to Williamson and Woroch, hierarchical contracting stifles program diversity, causes an "incentive degradation and invites strategic investment and behavior of an inefficient kind."[93] Williamson and Woroch do not make a convincing case that the vertical relationships in the broadcasting chain threaten to become coercive in nature. They men-

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90 *Id.* at iii–iv.

91 *Id.* at 22.

92 *Id.* at 17–18.

93 *Id.* at 32.

tion joint ventures between networks and program producers, increased network holdings of minority and nonvoting shares in stations, and supposedly more restrictive affiliation agreements.[94] There is no evidence, however, that networks control program producers or broadcast stations in any meaningful sense. They also do not present evidence that the vertical relationships would become hierarchical in the absence of PTAR. The Commission's own staff has posited that economic efficiency would be enhanced if Commission rules interfered less with strong vertical relationships between networks and affiliates.[95]

A significant factor in determining the amount of autonomy at each stage of production and distribution is competition—a factor that Williamson and Woroch neglect to discuss. Competition forces firms to behave in an efficient manner. The relationships among producers, networks and affiliates is highly competitive, rooted in competition for viewers and advertising dollars. The ability of stations to affiliate with any or none of the networks compels the networks to offer competitive terms in their affiliation agreements. Stations' bargaining power is further enhanced in some markets in which the number of stations seeking affiliation is less than the number of networks offering affiliation. This competition helps prevent networks from forcing stations to accept affiliation contracts that are unfavorable to the stations.

Williamson and Woroch's claim that firms with "hierarchical" organizations suffer from bureaucratic rigidity must also be considered in light of the importance of competition. Williamson and Woroch recognize that "the degree to which managers are able to give vent to their bureaucratic predilections varies with the condition of competition in product and capital markets."[96] Competition among networks and stations for viewers and audience provides strong incentives for networks to maintain an effi-

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94 *Id.* at 8–9.

95 FCC, NETWORK INQUIRY SPECIAL STAFF, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP, AND REGULATION. (1980), Volume 1, at 400.

96 *Id.* at 35.

cient degree of internal control and management. Those who allow their own bureaucracies to interfere with efficient production and distribution of programs will lose audience, advertisers and revenue to more efficient firms.

Thus it is clear that Williamson and Woroch have not shown that the first of their reasons for retaining PTAR—that it promotes non-hierarchical contractual relationships—is valid. The relationships involved in program production and distribution are not coercive and are in no danger of becoming coercive. The freedom of producers, networks and stations to contract with competing buyers and sellers compels each party to offer the best terms possible. These same forces scrape away bureaucratic barnacles. Based on Williamson and Woroch's arguments, if contracting is not hierarchical, then it does not reduce diversity.

B. Collective action among networks and affiliates

Williamson and Woroch also argue that PTAR allows networks and affiliates to achieve potential collective action benefits. They note that "cooperation among competitors is often regarded as conspiratorial and anticompetitive," but claim that it can yield beneficial results.[97] The benefit Williamson and Woroch would like to have offset the harm of anticompetitive action is improved program diversity, especially with regard to local programming. In fact, the Rule has not promoted local programming.[98] Much of the programming broadcast by the network affiliates during the access period is barter-syndication programming geared toward national audiences. Not only is this programming not local, but it is lower quality than the network or off-network programming that would take its place absent PTAR.

It is not at all clear that the Rule has increased diversity, especially to the extent that diversity comes in the form of local programming. The Rule may actually have decreased diversity in the access period by encouraging

97 *Id.* at 30–31.

98 EI, *supra* note 23, at 131.

"stripping," *i.e.*, airing the same program each weekday night. To the extent stripped programs replace network programming, program variety is reduced.[99] Thus there is no basis for Williamson and Woroch's rationalization that so-called diversity benefits justify facilitating otherwise anti-competitive collective action.

C. Foreclosure of programming resources and distribution outlets

The third major rationale Williamson and Woroch put forward for retaining the network restriction is that it counteracts the foreclosure of independent programmers. Williamson and Woroch claim that there is "a race for essential programming resources and distribution outlets" sparked in part by the emergence of new networks, the spread of cable and the prospect of new multi-media services.[100] This "race" supposedly harms independent programmers by diminishing their opportunities for selling their programs. Consequently, Williamson and Woroch assert that without the Rule independent producers would be forced to exit or program for cable television. Williamson and Woroch also claim that increased vertical control would deter potential new entrants into programming and broadcasting because new, small-scale firms would not be able to compete with large incumbent firms.[101]

The implication of the "land rush" terminology used by Williamson and Woroch is that firms acquire fixed assets to keep them from their competitors. This does not reflect the realities of the video production and broadcasting business. Networks do not typically purchase programming talent or production companies. Rather the networks contract with them to provide video programming. These resources are highly mobile; their services can be bid away by competing purchasers including other networks, cable systems, syndicators and film makers. There is no reason to

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99 *Id.*, Appendix H, at 130.

100 Williamson & Woroch, *supra* note 2, at 40.

101 *Id.* at 41.

believe that this structure is dependent on PTAR. Indeed, the evidence is that the inputs to program production are in extremely elastic supply.[102]

New producers entering the market compete mostly with other independent producers to win programming contracts. The evidence clearly indicates that small producers can thrive in this business. The vast majority of production companies produce only one show. On average, ABC, CBS and NBC each accounts for less than 2 percent of program titles. Vertical integration would not necessarily foreclose small production companies who can and do fill programming needs of the networks and others.

Foreclosure is no more of a problem in the distribution end than in the programming end. Relatively few broadcast stations are vertically integrated with the networks; most have affiliation agreements. The number of distributors (*e.g.*, cable networks) and distribution facilities (*e.g.*, DBS, VDT) is increasing almost daily. As with the programming resources discussed above, broadcasting resources are mobile. Existing stations become independent or switch their affiliations among ABC, CBS, NBC, Fox, UPN or WB. Entrants compete with existing stations for affiliation and are not foreclosed from the market.

D. Summary

Williamson and Woroch base their support for PTAR on the ground that the Rule promotes diversity by fostering non-hierarchical contractual relationships, enabling the realization of collective benefits and counteracting foreclosure. It is clear, however, that even if more diversity is needed, PTAR is not the right tool for promoting it. The current contractual relationships among producers, networks and stations are non-coercive because of competition, not because of PTAR. Collective action facilitated by PTAR does not result in greater programming diversity. There is no evidence that vertical relationships among producers, networks and

102 OWEN & WILDMAN, *supra* note 10, at 58–59.

stations foreclose some producers or stations or deter entry. Again, competition compels all firms to operate efficiently.

VIII. Conclusion

The Prime Time Access Rule is, and has always been, ill-conceived as a vehicle to achieve the ends sought by the Commission. There is no reason to believe that market outcomes in production or distribution of television programs are inferior to government-influenced outcomes. The inferred market failures used to justify the Rule—the widely discredited notion of market power on the part of ABC, CBS and NBC, the technical handicap formerly suffered by UHF broadcasters and the claimed disadvantage of first-run syndicated programming vis-à-vis off-network programming—are not market failures at all. The one real market failure—the public good nature of video programming—is not addressed (and is even worsened) by the Rule.

It is senseless to subsidize independent stations by penalizing network affiliates and large numbers of television viewers. There is no credible economic evidence that the Rule has had any material effect on the growth of independent stations. It is not needed to guarantee the survival of independent stations or the viability of emerging networks. Nor is the Rule needed to reduce the control of ABC, CBS and NBC over their affiliates.

There is no evidence that the UHF technical handicap persists today. Even if there were a legitimate economic basis for subsidizing UHF independent stations, the Rule is not an appropriate policy tool for implementing such a subsidy. The Rule is simultaneously too broad in that it subsidizes all independents and too narrow in that it excludes certain UHF stations.

Further, the Rule is not needed to increase diversity of programming. It has not increased the amount of local programming and, if anything, has reduced the variety of programs aired during the access period.

Nothing in the analysis put forward by LECG or by Williamson and Woroch undermines the conclusion that the Prime Time Access Rule is in every respect unsound public policy.

Appendix A

Table A–1 Independent stations and cable penetration

Year	Independent Stations	Subscribers as percent of households	Year	Independent stations	Subscribers as percent of households
1960	25	1.4	1977	89	16.7
1961	26	1.6	1978	94	17.8
1962	28	1.7	1979	106	18.9
1963	29	1.9	1980	113	21.0
1964	32	2.1	1981	135	22.9
1965	36	2.4	1982	160	25.8
1966	41	2.9	1983	186	30.0
1967	50	3.8	1984	214	34.6
1968	58	5.0	1985	255	37.7
1969	59	6.3	1986	293	43.7
1970	62	7.7	1987	310	46.9
1971	69	8.8	1988	321	49.7
1972	73	9.7	1989	339	52.5
1973	75	11.3	1990	345	54.3
1974	77	13.1	1991	355	54.8
1975	79	14.3	1992	422	57.5
1976	84	15.5	1993	438	58.2

Sources: INTV (All independent stations data through 1991 are year end. The 1992 figure is from March 1993 and the 1993 figure is from Feb. 1994.); Nielsen Media Research, *Total U.S. TV Households Universe Estimate Trends*; 1994 TELEVISION & CABLE FACTBOOK, SERVICES, I–68.

Table A–2 Independent stations and total advertising expenditures in real dollars for all media

Year	Independent Stations	Expenditures (billions of 1987 $)	Year	Independent Stations	Expenditures (billions of 1987 $)
1965	36	54	1976	84	64
1966	41	57	1977	89	68
1967	50	56	1978	94	73
1968	58	57	1979	106	76
1969	59	58	1980	113	76
1970	62	56	1981	135	78
1971	69	56	1982	160	79
1972	73	60	1983	186	87
1973	75	61	1984	214	97
1974	77	60	1985	255	100
1975	79	57			

Sources: INTV; McCann-Erickson.

Table A–3 1993 UHF station profitability

Station group	Average cash flow	Average pre-tax profits
UHF affiliates of ABC, CBS and NBC	$1,773,132	$579,395
UHF independents	$3,259,436	$1,547,722
UHF independents and Fox	$3,552,351	$1,625,110

Source: NATIONAL ASSOCIATION OF BROADCASTERS, SPECIAL ANALYSIS

Table A–4 Real prime-time network advertising rates and audience share

Year	Prime-time advertising costs per thousand homes (1987 $)	Prime-time network audience share	Year	Prime-time advertising costs per thousand homes (1987 $)	Prime-time network audience share
1965	7.0	94.1	1980	5.3	90.5
1966	6.7	95.0	1981	5.2	86.2
1967	6.7	94.0	1982	5.9	83.3
1968	6.2	92.9	1983	6.2	80.4
1969	6.2	92.1	1984	8.1	79.0
1970	6.0	91.2	1985	6.9	76.7
1971	4.9	90.4	1986	7.0	77.1
1972	5.1	93.2	1987	7.0	75.7
1973	5.5	91.1	1988	7.9	70.7
1974	5.1	92.2	1989	7.7	67.4
1975	4.9	92.9	1990	8.6	65.8
1976	4.6	92.4	1991	7.7	62.4
1977	5.3	93.3	1992	6.4	62.7
1978	5.2	92.9	1993	6.8	60.1
1979	5.9	91.5	1994	6.1	60.6

Sources: TV Bureau of Advertising, *Trends in Media: Audience Cost CPM's 1994* (utilizing data from A.C. Nielsen); ABC Affiliate Relations, based on NIELSEN TELEVISION INDEX (various years).

Table A–5 Real local TV advertising expenditures

Year	Local TV advertising (millions of 1987 $)	Year	Local TV advertising (millions of 1987 $)
1960	1077	1977	3485
1961	1087	1978	4018
1962	1086	1979	4095
1963	1136	1980	4135
1964	1267	1981	4240
1965	1359	1982	4486
1966	1503	1983	4958
1967	1538	1984	5587
1968	1814	1985	6053
1969	1958	1986	6722
1970	2000	1987	6833
1971	2146	1988	6997
1972	2497	1989	7016
1973	2700	1990	6934
1974	2699	1991	6433
1975	2711	1992	6682
1976	3270	1993	6830

Source: McCann-Erickson